

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

Docket No. 05-17-WC

RECEIVED

JAN 13 2006

Appeal of Daniel Osborn
In RE: Shoreland Protection Act
Wetlands File No. 2005-01071

MEMORANDUM OF LAW
IN SUPPORT OF APPEAL

NOW COMES the appealing Party, Daniel Osborn, and through his attorney, Beaumont & Campbell Prof. Ass'n. submits the following Memorandum of Law in support of his appeal:

BACKGROUND

Daniel Osborn (hereinafter "the Owner") is the owner of a parcel of land on B Island Pond in Atkinson, New Hampshire. Until 2004, the lot was a vacant parcel of land. In 2004 he began construction of a new single-family dwelling. The dwelling meets the fifty (50') foot reference line, as required in RSA 483-B:9 (II) (b). In May of 2005 the Owner filed a variance request under RSA 483-B:9 (V) (g) seeking permission under the Shoreland Protection Act (hereinafter "the Act") to allow a deck to within forty-two (42) feet of the reference line.

On August 30, 2005, the Commissioner denied the Owner's request, not on merits, but instead because the Commissioner asserted that he had no jurisdiction to grant the requested variance. In essence, and as framed at the pre-hearing conference, it is the Commissioner's interpretation that he has no jurisdiction to grant variances to allow expansion of any structure built after July 1, 1994. See, Letter of Denial dated August 3, 2005, attached as Exhibit C to the Appeal document.

Petitioner believes the Commissioner's decision is erroneous because:

- 1) It misconstrued the language of RSA 483-B:9 (V) (g); or
- 2) If the statute cannot be interpreted to allow a variance, then the statute is unenforceable as an unreasonable regulation of land use under the State Constitution. Therefore, the statute must be interpreted to include waiver/variance process.

This Memorandum addresses each argument in turn.

STATUTORY INTERPRETATION

The Act is Chapter 483-B of the Revised Statutes Annotated. In the officially issued volumes by West Group Publishing, it begins on Page 358 of the 2001 replacement volume for Titles 48-50. It consists of a series of twenty (20) Sections. Cf., RSA 20: (reference to laws by Chapter and Sections). One "Section" under Chapter 483-B Section 483-B:9 entitled "*Minimum Shoreland Protection Standards*". This Section begins with the following language in Paragraph I:

"I. The standards in this section are designed to minimize shoreland disturbances, so as to protect public waters....."

(emphasis added)

This introductory language makes clear that all of the "standards" within RSA 483-B:9 are coordinated together for one general purpose.

Under Paragraph II of RSA 483-B:9 one finds the following provisions:

"II. Within the protected shoreland, the following restrictions shall apply:.

- (b) *Primary structures shall be set back behind the primary reference line. This line shall be set back 50 feet from the reference line...."*

It is agreed that the fifty (50') foot reference line is applicable in Atkinson with respect to Shoreland Protection purposes.

In addition to the "restrictions" in Paragraph II, RSA 483-B:9 contains "restrictions" in other paragraphs (e.g. RSA 483-B:9 (IV-d)), including Paragraph V which begins:

"V. The following minimum standards shall apply to the Protected Shoreland...."

There follows a series of lettered "sub-paragraphs" (a-g), several of which contain limitations, restrictions or "standards" for development. See, e.g. RSA 483-B:0 (V) ([Septic Systems]). Paragraph V also includes the following sub-paragraph which, unlike the others, has no heading:

"(g) The Commissioner shall have the authority to grant variances from the minimum standards of this Section. Such authority shall be exercised subject to criteria which govern the grant of a variance...."

(emphasis added)

Owner contends that the words "*this Section*" can only be read to refer to all of the provisions of RSA 483-B:9. Section refers to all of the language in RSA 483-B:9. If the legislature had intended to limit the variance authority, it could have/would have said "the Paragraph" (meaning RSA 483-B:9 (V)).

When the Supreme Court interprets a statute, the starting point is the language of the statute. See, State vs. Leonard, 151 N.H. 201 (2004). The Supreme Court construes the language of the statute according to its plain and ordinary meaning. Verizon New England vs. City of Rochester, 151 N.H. 263 (2004). The word "this Section" is clear and unambiguous and can only be a reference to the entire "section", i.e. RSA 483-B:9.

Further, as is noted in the following section of the argument, to not interpret 483-B:9 (V) (g) to allow a variance for houses built after 1994, may produce an illogical result. Statutes should not be interpreted to produce an illogical result, and should be interpreted in a way which avoids nullifying the purpose of the statute. State vs. Kay, 115 N.H. 69 (1975).

To the extent that the reference to "this section" in RSA 483-B:9 (V) (g) injects "ambiguity" to the statute, then in those circumstances, recourse to a statute's legislative history is appropriate. See, Flags I, Inc. vs. Boston Five Cent Savings Bank, 831 F. Supp. 928 (D. N.H. 1993); Appeal of Public Service Co. of New Hampshire, 125 N.H. 46 (1984). A review of the legislative history of this statute supports the Owner's contention that RSA 483-B:9 (V) (g) must be read broadly.

The comprehensive Shoreland Protection Act was first enacted in 1991, although due to a funding contingency, its effective date was delayed until 1994. See, Chapter 30 Laws of 1991. The bill was first introduced to the New Hampshire House on February 1991 as HB 443. It was considered by both the House Committee on Resource Recreation and Development as well as the Senate Environmental Committee. The original language of HB 443 did not contain the variance language found in RSA 483-B (V) (g). In fact, in the original draft, RSA 483-B:9 (V) had only four (4) sub-paragraphs (d). During the House Committee hearing on February 14, 1991, the New Hampshire Municipal Association suggested the following amendment to the bill:

"Amend RSA 483-B:9,V by inserting the following new sub-paragraph:

(e) The commissioner shall have the authority to grant variances from the minimum standards of this section. Such authority shall be exercised subject to the criteria which govern the grant of a variance by a zoning board of adjustment under RSA 674:33, I (b).

In speaking to the amendment (then) NHMA Counsel Timothy Bates stated the following:

"..... the third portion of the amendment grants DES Commissioners to grant (sic) setback variances, since this bill is really a "state zoning" bill and hence must have a variance-granting (provision). This Section was in the original Study Committee draft and was "lost" in Legislative Services...."

Minutes of House Committee on
Resources, Recreation and Development
February 14, 1991 (from State Archives)

This language reinforces the arguments made in Section II below, and reflects strongly the intention of restoring the waiver provision. In fact, it can be argued that the intent was to make this addition a new sub-paragraph in RSA 483-B:9, but for the way it was originally submitted by the NHMA attorneys.

The amended HB 443 was reported out of the House on March 7, 1991, containing the newly incorporated waiver language as RSA 483-B:9 (V) (g) [as it exists today]. The Senate Environmental Committee heard from many witnesses, including Richard deSeve, then representing the New Hampshire Environmental Conference [NOTE: Richard

J. deSeve is now a staff attorney with the New Hampshire Department of Environmental Services]. In response to questioning from (then) Senator Wayne D. King, Attorney deSeve makes the following statements:

Senator Wayne D. King, D. 2: *"Dick, let's take the example that Representative Larson brought up where the individual comes up with their plan initially and then finds out there is a whole bunch of ledge. Good scientific documentation can be made that if I moves 40 feet from the water, then he can place the house in a method consistent with good stewardship of the lake and the land. Should there be a mechanism where the Commissioner of Environmental Services could look at that and say "Yes"?"*

Richard deSeve: *There is. That is the exemption provision. The exemption provision provides for exceptions.*

Senator Wayne D. King, D. 2: *Fine. You believe that the exemption provision allows for that even though it deals with municipalities and not individuals.*

Richard deSeve: *I believe it does, but more importantly on page 15 under subparagraph it says: "The commissioner shall have authority to grant variances on the minimum standards of this section."*

Senator Wayne D. King, D. 2: *Pardon me. I must have missed that in my first reading*

Richard deSeve: *That's all right (sic). It is a long bill, but that was the whole point in putting that section in. That is that nobody is perfect. There are differences along the shorefronts and those should be taken into account because Representative Larson is right. Sometimes there is a better way to do it than is provided in the standard in this bill. That should be provided for.*

I don't necessarily consider this statewide zoning, but it certainly is setting up a system at least minimal state land use controls and that is in perfect keeping with the state's police powers."

There appears ample support in the legislative record to show that the "variance provisions which were added at the request of the NHMA were intended to provide the "safety valve" needed for the enactment of "statewide zoning". It therefore appears clear that the language which comprises RSA 483-B:9 (V) (g) was intended to apply to all the "restrictions" or "standards" in RSA 483-B:9.

Consequently, the Council should find that the Commissioner does have authority and

RSA 483-B:9 (V) (g) to consider the Owner's waiver request, and the matter should be remanded to the Commissioner to consider the Owner's request on its merits.

CONSTITUTIONAL REQUIREMENT FOR WAIVER

In the event that the statute cannot be construed to give the Commissioner variance authority to consider the Owner's application, then the statute itself must give way.

There is no better summary of the rights of property owners than that put forth by Justice Horton in his dissent in the case of Grey Rock's Land Trust vs. Town of Hebron, 136 N.H. 239, 246 (1992). Justice Horton points out the repeated reaffirmation of the constitutional right to the use and enjoyment of one's property, in any reasonable way, and that the imposition of regulations (such as zoning) must be viewed as a "balancing of the injury or loss to the landowner against the gain to the public". Grey Rocks, *supra* at 246, citing, Metzger vs. Town of Brentwood, 118 N.H. 497 (1977). Justice Horton points out that, in the case of zoning ordinances, the variance process serves as the "safety valve" which permits the general applicability of a regulation in the face of unique unconstitutional impacts. Husnander vs. Town of Barnstead, 139 N.H. 476 (1995); Grey Rocks, *supra* citing, Bouley vs. Nashua, 106 N.H. 79 (1964). See also, 3 Anderson's American Law of Zoning 4th Ed. § 19.08 and 19.09.

The majority of the Supreme Court adopted a more protective view of property owner rights in the case of Simplex Technologies vs. Town of Newington, 145 N.H. 72 (2001). To safeguard the rights of landowners, the Court held that regulations must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation. Simplex, at 731.

Without the institution of some type of variance process, the provisions of RSA 483-B:9 can have the effect of having an unconstitutional burden on certain properties, such as that owned by the Owner in this case. The remedy sought is a determination that the Commissioner must fulfill the individual "balancing" analysis. The legislature has provided the suggested framework in RSA 483-B: 9 (V) (g), and this Council should move to establish that authority in this decision.

CONCLUSION

Based on the foregoing arguments, the Owner would request that the Wal
Council:

Reverse the decision of the Commissioner, and remand this matter to t
Commissioner to evaluate the Owner's Shoreland Variance Application under the statut
variance standard.

Respectfully submitted,
Daniel Osborn
BY HIS ATTORNEYS
Beaumont & Campbell Prof. Ass'n.
One Stiles Road – Suite 107
Salem, New Hampshire 03079

Dated: _____

Jan 12, 2006

By: _____

Bernard H. Campbell, Esquire

CERTIFICATION OF COPIES

In accordance with Rules of the Council, an original and twenty (20) copies of th
foregoing has been filed with the Clerk herewith; additional copies have been forwarded t

K. Allen Brooks, Esq.
NH Department of Justice
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301

Michael P. Nolin, Commissioner
NH Dept. of Environmental Services
P.O. Box 95
Concord, New Hampshire 03302-0095

Dated: _____

Jan 12, 2006

Bernard H. Campbell, Esquire